

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 10-24549-rdd

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5 In the Matter of:

6 THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

7 Debtors.

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10 MODIFIED BENCH RULING ON THE MOTION OF HUDSON ENERGY
SERVICES, L.L.C. FOR ALLOWANCE OF AN ADMINISTRATIVE CLAIM

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12 **APPEARANCES:**

13 KIRKLAND & ELLIS, LLP

14 Attorneys for the Reorganized Debtors

15 BY: ANDREW M. GENSER, ESQ.

16 and HUNTER MURDOCK, ESQ.

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18 ANDREWS & KURTH, LLP

19 Attorneys for Hudson Energy Services, L.L.C.

20 BY: DAVID A. KDUNKEWICZ, ESQ.

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22 APPEARING TELEPHONICALLY:

23 DOUGLAS GOULD

24 JOSHUA SIEGEL

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1 HON. ROBERT D. DRAIN, UNITED STATES BANKRUPTCY JUDGE:

2 I have before me a motion by Hudson Energy
3 Services, LLC, which I'll refer to as "Hudson," for the
4 allowance of an administrative claim under Section 503(b)(9)
5 of the Bankruptcy Code. Because this Court established a
6 bar date that included Section 503(b)(9) claims,
7 procedurally this is couched as an objection to Hudson's
8 claim.

9 But because it is an administrative claim, I
10 believe that the burden is on Hudson to establish its right
11 to the administrative expense. And that's what's at issue
12 here, as opposed to the amount of the claim.

13 Section 503(b)(9) of the Bankruptcy Code was
14 enacted in 2005 as part of BAPCPA. It states that "After
15 notice and a hearing, there shall be allowed administrative
16 expenses, including the value of any goods received by the
17 debtor within 20 days before the date of commencement of a
18 case under this title in which the goods have been sold to
19 the debtor in the ordinary course of such debtor's
20 business."

21 Hudson sold electricity to the debtor pursuant to
22 a contract that's attached as Exhibits A, B, and C (Exhibits
23 B and C referring to agreements incorporated in the contract
24 attached as Exhibit A) to the declaration of Hunter Murdock
25 in support of the debtor's opposition to the administrative

1 claim. The debtor does not dispute that the electricity was
2 sold to the debtor in the ordinary course of the debtor's
3 business or that the electricity at issue here, for which
4 Hudson seeks an administrative claim of \$875,943.90, was
5 supplied to the debtor within 20 days before the start of
6 the debtor's bankruptcy case.

7 What the debtor disputes is whether the
8 electricity provided under the contract by Hudson was, in
9 fact, "goods" within the meaning of Section 503(b)(9). (I
10 don't believe the debtor disputes the value of the
11 electricity, either. The amount claimed is apparently the
12 amount that was actually billed for the electricity provided
13 within 20 days of the petition date.)

14 As noted by Collier: "Section 503(b)(9)
15 fundamentally shifts the order and nature of payment to
16 creditors. Prepetition vendors eligible under Section
17 503(b)(9) now have a priority ahead of wages, taxes, and all
18 other priorities that rank below administrative expenses
19 under Section 507. Section 503(b)(9) results in disparate
20 treatment of otherwise similarly situated creditors that
21 provided value to the debtor during the 20 day period
22 preceding the filing of the case but will not receive an
23 administrative expense priority if their prepetition claim
24 is not for the delivery of goods." 4-503 Collier Bankruptcy,
25 Paragraph 503.16 (16th Ed. 2012).

1 That fundamental shift highlights even more than
2 normally that provisions allowing administrative claims
3 "must be tightly construed." *Howard Delivery Serv. v.*
4 *Zurich Am. Ins. Co.*, 547 U.S. 651, 667, 669 (2006). That is
5 because administrative expenses that have priority under
6 Section 507(a)(2) must be paid in full before non-priority
7 claims are paid. Thus, each creditor holding an unsecured
8 claim pays a part of the administrative claim unless, as is
9 clearly not the case here, the debtor is financially able to
10 pay all unsecured claims in full. *Id.*; see also *In re*
11 *Bethlehem Steel Corp.*, 479 F.3d 167, 172 (2d. Cir. 2007),
12 and *In re Texaco, Inc.*, 2011 U.S. Dist. Lexis 111533, at *21
13 (S.D.N.Y. Sept. 28, 2011).

14 Thus, a party claiming an administrative priority
15 "must fit clearly" within the priority provision of the Code
16 in order to be entitled to such a claim. *Howard Delivery*,
17 547 U.S. at 677.

18 Unfortunately, at the edges -- and, clearly, the
19 provision of electricity is at the edges -- Section
20 503(b)(9) is neither clear nor has it been clearly applied
21 by the courts.

22 The courts uniformly agree that they can be guided
23 in their interpretation of what is a "good" or what are
24 "goods" for purposes of Section 503(b)(9) by the definition
25 set forth in Section 2.105 of the Uniform Commercial Code.

1 See In re Circuit City Stores, Inc., 416 B.R. 531, 537
2 (Bankr. E.D. Va. Sept. 22, 2009), as well as In re Grede
3 Foundries, Inc, 440 B.R. 791, 797 (W.D. Wisc. 2010), and In
4 re Goody's Family Clothing, Inc., 401 B.R. 131, 134 (Bankr.
5 D. Del. 2009). See also In re Samaritan Alliance, LLC, 2008
6 Bankr. Lexis 1830, at *6-7 (Bankr. E.D. Ky. June 20, 2008),
7 and 4-503 Collier on Bankruptcy, Paragraph 503.16[1].

8 The basis for looking to the UCC definition of
9 "goods" is well summarized in the Goody's case in light of
10 the near unanimous nationwide adoption of Article 2 of the
11 UCC and, as Judge Sontchi says in that opinion, the fact
12 that the definition of goods set forth in the UCC is
13 consistent with the ordinary non-legal meaning of the word,
14 which he takes from the dictionary: property or possessions,
15 especially movable property.

16 As Judge Sontchi also notes in Goody's, the
17 statute, as enacted in 2005, in referring only to goods
18 leads the Court to distinguish the concept from "services,"
19 which the Bankruptcy Code uses in conjunction with goods in
20 several other contexts. 401 B.R. at 135.

21 Unfortunately, however, as noted by Collier and
22 the courts that have had to deal with this issue, the term
23 "goods" as interpreted for purposes of Article 2 of the UCC
24 has not been interpreted uniformly throughout the country,
25 even though the courts applying it are interpreting a

1 uniform law. This has contributed to the fact that the case
2 law on the more narrow issue of the applicability of Section
3 503(b)(9) to electricity is, for my purposes, evenly divided
4 on whether electricity constitutes goods or not for purposes
5 of that provision of the Bankruptcy Code.

6 Two courts addressing the issue directly and
7 applying a UCC analysis, among others, have held that for
8 purposes of Section 503(b)(9) electricity is not a good. In
9 re Pilgrim's Pride Corp., 421 B.R. 231 (Bankr. N.D. Tex.
10 2009), and In re Samaritan Alliance, LLC, 2008 Bankr. Lexis
11 1830 (Bankr. E.D. Ky. June 20, 2008).

12 On the other hand, two courts have concluded --
13 again, looking by analogy to Article 2 UCC case law, that
14 for purposes of Section 503(b)(9) of the Bankruptcy Code
15 electricity is a good for the purposes of that section. In
16 re Erving Industries, Inc., 432 B.R. 354 (Bankr. D. Mass
17 2010), and GFI Wis., Inc. v. Reedsburg Util. Comm'n (In re
18 Grede Foundries, Inc.), 440 B.R. 791 (W.D. Wis. 2010).

19 In large measure, the conflict between those
20 decisions is driven by a conflict in the underlying UCC case
21 law. It's probably fair to say that a majority of courts
22 interpreting Section 2.105(1) of the UCC, which defines
23 "goods," have held that electricity is a good for purposes
24 of Article 2. However, there is a strong minority position,
25 and as the debtors' point out, the leading cases in support

1 of that minority position are from the New York Court of
2 Appeals and the Second Circuit and the District Court for
3 the Southern District of New York.

4 The case law is noted in the parties' briefs and
5 is also well summarized in two law review articles: William
6 R. O'Connor: "Are You Positive Electricity is a Good? Why
7 Electricity Should Be Considered a Service Under Section
8 503(b)(9) of the Bankruptcy Code," 42 University of Memphis
9 Law Review 187 (2011), and Colby Bailey: "Energy 'Goods':
10 Should Article 2 of the Uniform Commercial Code Apply to
11 Energy Sales in a Deregulated Environment," 37 John Marshall
12 Law Review 281 (2003).

13 The debtors contend that given all of the
14 bankruptcy courts' deference or willingness to take guidance
15 from the UCC definition of goods for purposes of the
16 503(b)(9) analysis, I should defer to the interpretation of
17 New York's UCC, which is the same, both in terms of the
18 statute and the comments, as the Uniform Act, which, as I've
19 noted, has repeatedly held, in various contexts, that
20 electricity is not a good.

21 The debtors contend that that should be end of the
22 story, particularly in light of the fact that this contract
23 is one that is wholly governed by New York law. The
24 electricity provided here is provided only to New York
25 locations, Hudson is a New York corporation and therefore

1 would reasonably expect that New York law would govern the
2 parties' rights under the contract.

3 The debtors cite to a number of cases that apply
4 the law of a particular state in connection with various
5 bankruptcy issues. Most of those cases, however, deal with
6 situations where there is a property interest at stake or a
7 particular right to payment based on a claim governed by a
8 particular state law is at issue.

9 Here, the underlying right to payment is a claim
10 for \$800,000+; but what is at issue before me is a priority,
11 which is governed by federal law, the Bankruptcy Code.
12 Again, see *In re Texaco, Inc.*, 2011 U.S Dist. Lexis 111533,
13 at *11-13 (S.D.N.Y. Sept. 28, 2011).

14 There are cases, however, where courts have looked
15 to applicable state law when determining a bankruptcy law
16 right, such as in the area of non-dischargeability. So
17 there is some logic to the debtors' argument that New York
18 law should, in fact, govern this dispute over what is a good
19 and that the Court would be uniformly applying or
20 interpreting the Bankruptcy Code as required by the
21 Constitution by adopting a uniform rule that where the
22 parties' reasonable expectations are governed by an
23 applicable state's law, that principle can be applied
24 uniformly throughout the country. So that, for example, a
25 503(b)(9) claim where the underlying contract would clearly

1 call for the applicability of Indiana law would lead to
2 electricity being defined as a good and, therefore, an
3 administrative claim, since the Indiana courts have
4 interpreted the UCC to include electricity as a good. See
5 In re Wabash Valley Power Ass'n, 1991 Bankr. Lexis 2213
6 (Bankr. S.D. Ind. Aug. 7, 1991), Helvy v. Wabash County
7 REMC, 278 N.E.2d 608 (Ind. App. 1972).

8 I have considered that argument carefully and have
9 decided that the Court here should not apply such a refined
10 analysis. It is certainly conceivable to me that there
11 would be situations where sellers of electricity would have
12 a contract that would not clearly be covered by any
13 particular state's law or might provide for delivery in
14 various states, and it appears to me that it would be
15 better, therefore, to apply a uniform-throughout-the-country
16 analysis to the issue, as opposed to simply applying the New
17 York UCC's definitions to Section 503(b)(9).

18 In that sense, I agree with the analysis of this
19 issue by Judge Boroff in Erving Industries, 432 B.R. at 366,
20 note 23, in which he concludes that the definition for
21 purposes of Section 503(b)(9) is ultimately a matter of
22 federal and not state interpretation.

23 Part of that federal interpretation, I believe, is
24 the fundamental interpretive principle that I stated at the
25 beginning of this ruling, which is that administrative

1 expense claims need to be construed narrowly rather than
2 broadly, and that a claim should clearly fit within the
3 statute's provisions or definition before it is accorded
4 administrative expense treatment.

5 I conclude that this claim for the sale of
6 electricity does not clearly fall within the definition of
7 the sale of a good or goods for purposes of Section
8 503(b)(9) and, therefore, I conclude that the request for
9 the allowance of an administrative expense here should be
10 denied.

11 I do so not only because of the clear number of
12 cases that disagree, both in the narrow sense under Section
13 503(b)(9) and in the larger sense under Article 2, applying
14 the inquiry or making the inquiry as to whether electricity
15 is a good throughout the country, but I also do it because I
16 conclude that the term as used in Section 503(b)(9) does not
17 clearly apply to electricity as sold here to the debtor by
18 Hudson; that it is an ambiguous term and that the
19 legislative history and context do not support the extension
20 of the definition to include the provision of electricity,
21 whether sold by a utility or, here, by an independent non-
22 utility marketer, Hudson.

23 I am guided in large measure by the definition in
24 Section 2.105(1) of the UCC, although I do find generally
25 that it is consistent with the non-statutory definitions of

1 the term. Again, as set forth in Section 2.105(1) of the
2 UCC, "goods" means "all things, including specially
3 manufactured goods, which are movable at the time of
4 identification to the contract for sale other than money in
5 which the price is to be paid, investment securities
6 (Article 8), and things in action. 'Goods' also includes
7 the unborn young of animals and growing crops and other
8 identifiable things attached to reality as described in the
9 section on goods to be severed from reality (Section
10 2.107)."

11 Also relevant is Subparagraph (4) of that
12 definition, which states that, "An undivided share in an
13 identified bulk of fungible goods is sufficiently identified
14 to be sold although the quantity of the bulk is not
15 determined. Any agreed proportion of such bulk or any
16 quantity thereof agreed upon by number, weight or other
17 measure may to the extent of the seller's interest in the
18 bulk be sold to the buyer who then becomes an owner in
19 common."

20 Official Uniform Comment number one to Section
21 2.105, which appears both in the New York UCC and the
22 uniform statute, states, among other things, "The definition
23 of goods is based on the concept of movability and the term
24 'chattels personal' is not used. It is not intended to deal
25 with things which are not fairly identifiable as movables

1 before the contract is performed."

2 The one distinction between the UCC definition and
3 the dictionary definition, albeit definition number 2 that
4 appears in the Court's American Heritage Dictionary, is the
5 notion that it goes beyond personal property. The
6 dictionary definition defines "goods" as: "(1) Merchandise;
7 wares; and (2) Portable personal property."

8 Black's Law Dictionary defines goods as "tangible
9 or movable personal property other than money, especially
10 articles of trade or items of merchandise, goods and
11 services," and then "things that have value" is the second
12 definition: "things that have value, whether tangible or
13 not."

14 The problem with the definition as applied to
15 electricity is that in some sense, clearly, electricity is
16 bought and sold, and, in a deregulated world, which applies
17 to this transaction, bought and sold separate and apart from
18 the seller's being a utility. It is, therefore, commonly
19 recognized to be a commodity, including for purposes of
20 Section 761(8)(n)(1) of the Bankruptcy Code. See *In re NBS*
21 *Management Services, Inc.*, 430 B.R. 750 (Bankr. E.D. La.
22 2010), in which the court states, citing numerous cases,
23 "Thus, no serious debate exists on the issue of
24 electricity's status as a commodity."

25 Anything that is bought and sold, as electricity

1 clearly is, must be also measurable; otherwise, it cannot be
2 such that the parties would be able to form a purchase
3 price. Electricity also falls into that category and it is
4 measured at a meter, both in terms of hours used and amount
5 of use or BTU.

6 Broadly construed, it is also a thing. It
7 certainly can be felt, as anyone who has had a shock knows.
8 And it is movable. It's delivered from one place to
9 another.

10 All of these things have led the courts who have
11 found that electricity is a good, either for purposes of
12 Article 2 or for Section 503(b)(9), to conclude that it is,
13 in fact, a good. The best analysis of this view is Judge
14 Boroff's in the Erving Industries case. He was, in
15 particular, moved by the fact that in that case the movant,
16 the seller, was, in his view, only a seller. It was not a
17 utility. It had bought the electricity from the generating
18 utility and it was responsible for delivering it to the
19 debtor.

20 I am less moved by the distinction between a
21 seller like Hudson, or the claimant in Erving Industries,
22 than that opinion was, however. It appears to me that the
23 distinction simply highlights the current marketability of
24 electricity separate and apart from the creation or
25 distribution of it.

1 But a number of courts, including courts who have
2 taken a contrary view, do not view transactions involving
3 electricity as transactions that are pure sale transactions.
4 Rather, they involve an analysis of whether the transaction
5 is fundamentally a service. I'm not particularly moved by
6 that distinction either, although clearly there is a
7 distinction between a service and a good. (Obviously, as
8 set forth in Goody's, it is critical that there be a seller
9 with title to the goods for purposes of 503(b)(9), but
10 that's undisputed here.).

11 My analysis really comes down to the ambiguity as
12 to whether a thing of this nature is, in fact, a "good" as
13 intended by Congress. Even under the UCC definition, one
14 can make a very good case, as have the New York courts
15 relied upon by the debtor as well as the two bankruptcy
16 court cases that I've cited, that electricity does not fall
17 within the UCC definition. It is not identifiable until the
18 moment it reaches the meter, and at that point it is used.
19 So it is hard to see that it is actually movable at the time
20 of identification. It, in essence, disappears into use at
21 that moment.

22 It also is not, I believe, an identifiable bulk of
23 fungible goods. It is simply a stream of electrical energy.
24 It is only identified, again, at the point of delivery. And
25 consistent with the concept set forth in the Official

1 Comment that I quoted, it is not "fairly identifiable before
2 the contract is performed." It's only identifiable at the
3 moment the contract is performed.

4 Obviously, other courts with well-reasoned
5 arguments have taken a different view, in essence delving
6 into, although they say they needn't, physics. I believe
7 they are largely moved by the notion, which I think is
8 distinguishable, that electricity is a commodity, which I do
9 not believe clearly makes it a good, particularly for
10 purposes of Section 503(b)(9).

11 Again, the fact that something can be bought and
12 sold does not necessarily mean that it fits the definitions
13 that I've quoted.

14 In this regard, it would seem clear to me,
15 notwithstanding the directive that the Court must apply the
16 plain meaning of a statute first and foremost and never
17 inquire of the legislative history unless the statute is
18 ambiguous, that this statute, although it uses a simple
19 word, "goods," is ambiguous when applied to electricity.

20 Therefore, I believe it is incumbent to look at
21 the context of the statute when it was enacted.

22 Here, as I've noted, Congress in 2005 did
23 something unprecedented in preferring vendors of goods over
24 other prepetition creditors, including taxing authorities
25 and employees, who have a more junior priority, and

1 certainly over other prepetition creditors who supply value
2 to a debtor within 20 days before the bankruptcy case.

3 The statute was enacted along with and in the
4 context of modifications to the Bankruptcy Code's
5 reclamation provisions, at Section 546(c) of the Code. They
6 do not cross-reference each other and, clearly, Section
7 503(b)(9) provides a separate and independent right to the
8 right set forth in Section 546(c). However, they were
9 considered together, as noted at pages 22 and 23 of the
10 debtors' memorandum in opposition. Clearly, one cannot
11 reclaim electricity, just as one cannot often reclaim goods
12 that have been spoiled and are not easily identifiable. But
13 the concept of reclamation generally applies to more
14 tangible things than electricity.

15 The rationale behind granting this form of
16 preference has also been recognized, as set forth in the
17 Samaritan case, to discourage stockpiling by a debtor or an
18 entity in financial trouble prepetition, which would further
19 skew its supply relationships and its management of its
20 cash. 2008 W.L. 2520107, pages 3-4. Obviously, electricity
21 is not something that a debtor can stockpile. This
22 highlights, again, the other notion that I've stated, which
23 is that it is only identified at the very moment of delivery
24 because it is then used.

25 In light of all that, it would appear to me that

1 it is more likely than not that Congress intended Section
2 503(b)(9) not to apply to something like electricity, but,
3 rather, to the more colloquial definition of "goods," which
4 is a tangible thing and not a tangible thing that is
5 evanescent like electricity, but a thing that can be
6 identified before the contract is performed in a movable
7 quantity, a movable and measurable quantity.

8 But even if it's not more likely than not, it's at
9 least as likely that this was the case. And given that, and
10 given, again, the directive to construe the statute narrowly
11 because of the preference it gives and the money it takes
12 out of other creditors' pockets, I conclude that it should
13 not be construed here broadly to equate a sale of
14 electricity with a "good."

15 I recognize that this will, in some respects,
16 inject a third element into the analysis that has already
17 taken place in the courts, which I'm reluctant to do since
18 clear guidance is the most important thing that the parties
19 need to receive from the courts in general. But it appears
20 to me that, again, the courts have dealt with that issue in
21 Howard, Bethlehem and in other cases, i.e. where there is
22 not clear guidance with respect to an administrative expense
23 being allowable, the courts should clearly err on not
24 granting the administrative expense. And I believe that's
25 undoubtedly the case here.

1 So for those reasons I'll grant the debtor's
2 objection and deny the request for payment of administrative
3 expense to Hudson.

5 **Dated:** White Plains, New York
 October 25, 2012

7 /s/Robert D. Drain_____
UNITED STATES BANKRUPTCY JUDGE

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